

The record considered by the Appeals Board and the stipulations of the parties are listed in the Award. In addition, at oral argument the respondent and Workers Compensation Fund agreed that the Fund should be responsible for seventy percent (70%) of the costs and benefits associated with this Award if the opinion concerning Fund liability of Peter V. Bieri, M.D. may be considered. If that opinion may not be considered, the parties agreed that the Fund should be responsible for forty percent (40%).

ISSUES

The Administrative Law Judge found the Workers Compensation Fund responsible for seventy percent (70%) of the costs and benefits associated with this claim. The Workers Compensation Fund requested review and contends the Administrative Law Judge improperly considered the opinion of Dr. Peter V. Bieri in deciding the issue of Fund liability. That is the sole issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award should be modified. The Administrative Law Judge improperly considered the opinion of Dr. Peter V. Bieri in deciding the issue of Fund liability. Accordingly, the Workers Compensation Fund is responsible for only forty percent (40%) of the costs and benefits associated with this claim.

This is an issue of first impression. Because the parties could not agree upon claimant's functional impairment, the Administrative Law Judge requested an independent medical examination and specifically referred to K.S.A. 44-510e(a). On December 22, 1994, the Judge wrote Dr. Bieri of Lawrence, Kansas, and requested an evaluation, impairment rating, recommendations for future medical treatment and work restrictions. The Administrative Law Judge did not request the doctor's opinion concerning Fund liability. As requested, Dr. Bieri examined and evaluated claimant and forwarded his report to the Administrative Law Judge. The doctor gratuitously provided his opinion concerning Fund liability. In his report, the doctor indicated that two unnamed sources had raised the apportionment issue with him. During oral argument, respondent's attorney indicated he had made this inquiry. In the Award, the Judge referred to and utilized Dr. Bieri's opinion that claimant's present injury would not have occurred but for an earlier injury. However, Dr. Bieri did not testify.

The Workers Compensation Fund contends the Administrative Law Judge erred by considering Dr. Bieri's report in the absence of his testimony, when he decided the Fund liability issue. The Fund cites K.S.A. 44-519. The respondent and its insurance carrier contend Dr. Bieri's report may be considered by the Judge for purposes of deciding Fund liability under a liberal interpretation of K.S.A. 44-510e(a), which they quote in their brief. That statute provides in pertinent part:

"If the employer and the employee are unable to agree upon the employee's functional impairment, such matter shall be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination."

The statute is specific in nature and applicable to only those situations where the parties are unable to agree upon functional impairment.

On the other hand, K.S.A. 44-519 is more general in nature and provides that no report concerning an examination of an employee by a health care provider shall be competent evidence unless supported by the provider's testimony.

Based upon the facts now before us, the Appeals Board finds Dr. Bieri's opinion regarding Fund liability could not be properly considered by the Administrative Law Judge without the doctor's supporting testimony. The opinion regarding Fund liability was not requested by the Administrative Law Judge and, therefore, should not be considered part of the medical examination or part of the report that is admissible without the doctor's testimony. Once the parties, rather than the Administrative Law Judge, made inquiry of the doctor regarding issues extraneous to those the Administrative Law Judge desired the doctor to address, Dr. Bieri's function changed from that of providing an independent medical evaluation for the Administrative Law Judge to that of providing expert witness testimony for one or more of the parties.

This holding is limited to the specific facts of this case. No comment is expressed or intended pertaining to the admissibility of a opinion regarding Fund liability when that is specifically requested by the Administrative Law Judge.

Pursuant to the stipulation of the respondent, its insurance carrier and the Workers Compensation Fund, because Dr. Bieri's opinion is not properly in evidence and may not be considered, the Workers Compensation Fund is responsible for forty percent (40%) of the costs and benefits associated with this claim.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer entered in this proceeding on July 31, 1995 should be, and hereby is, modified; that the Workers Compensation Fund is responsible for 40% of the costs and benefits associated with this claim. The remaining orders contained in the Award are hereby adopted by the Appeals Board as if fully set forth herein.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Larry G. Karns, Topeka, Kansas
 Steven J. Quinn, Kansas City, Missouri
 Patrick M. Salsbury, Topeka, Kansas
 Floyd V. Palmer, Administrative Law Judge
 Philip S. Harness, Director